89-1710

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1989

IRON WORKERS MID-SOUTH PENSION FUND, LOUISIANA LABORERS HEALTH & WELFARE FUND AND LABORERS NATIONAL PENSION FUND,

Petitioners,

vs.

BORDEN CHEMICAL, A DIVISION OF BORDEN, INC.,

Respondent.

Sub nom: Iron Workers Mid-South Pension Fund, et al v. Terotechnology Corporation, et al

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The Fifth Circuit's decision that the Louisiana Private Works Act lien procedures are preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq. presents the following vital questions:

(1) Whether ERISA preempts the Louisiana Private Works Act when used by ERISA plans to collect, from the owner of a project at which the employee's work was performed, delinquent contributions owed by a signatory contractor?

(2) Whether, considering Congress' expressed intent to preserve plan remedies to collect delinquent contributions and judgments, the Louisiana Private Works Act, La.R.S. 9:4801 et seq. should be exempt from preemption under Section 514(a)?

(3) Whether the Fifth Circuit's decision conflicts with this Court's decision in *Mackey v. Lanier,* 486 U.S. 825, 108 S.Ct. 2182 (1988), which permits state laws used in aid of execution of judgments in favor of or against a plan to survive preemption?

(4) Whether this Court's decision in *Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549 (1987), which addressed the federal exclusivity of benefit claims by *participants* and *beneficiaries* against ERISA plans, mandates preemption of actions by such plans to collect delinquent contributions and delinquency judgments?

(5) Whether the Fifth Circuit has correctly applied ERISA preemption standards previously set forth by this Court, which have been subject to conflicting interpretations by other courts, to preempt lien laws which assist

employee benefit funds in collecting delinquencies and delinquency judgments?

(6) Whether the Louisiana Private Works Act "purports to regulate" the terms and conditions of ERISA plans within the meaning of Section 514(c)(2) of ERISA and "relate[s] to" such plans within the meaning of Section 514(a)?

(7) Whether the Louisiana Private Works Act affects the terms and conditions of ERISA plans in too tenuous, remote and peripheral a manner to trigger preemption?

(8) Whether the Louisiana Private Works Act should be adopted, in part, into the federal common law of ERISA to permit an ERISA action to be filed against a non-signatory to an agreement; for example, a surety under state lien laws?

PARTY LISTS AND CORPORATE PARENTS

The names of all parties in the proceeding below appear in the caption of this case, fulfilling United States Supreme Court Rule 14(b). In accord with Rule 29.1, petitioners aver that they are not corporations, and do not have corporate parents, subsidiaries, or affiliates.

Iron Workers Mid-South Pension Fund, Plaintiff-Appellant

Louisiana Laborers Health & Welfare Fund, Plaintiff-Appellant

Laborers National Pension Fund, Plaintiff-Appellant

Iron Workers Welfare Fund, Plaintiff

Iron Workers Local 623 Educational & Training Program Trust Fund, Plaintiff

Louisiana Laborers Local 1177 Apprenticeship Fund, Plaintiff

Construction & General Laborers Local 1177, Plaintiff

Millwrights Local 720 Pension Fund, Plaintiff

Millwrights Local 720 Apprenticeship Fund, Plaintiff

Millwrights & Machine Erectors Local Union 720, Plaintiff

IUOE Local 406, Plaintiff

I.B.P.A.T. Local Union No. 728 Health & Welfare Fund, Plaintiff

I.B.P.A.T. Local Union No. 728 Apprenticeship Training Fund, Plaintiff

Terotechnology Corporation, Defendant

Borden Chemical, a Division of Borden, Inc., Defendant-Appellee

James L. Ellis, Counsel for Defendant-Appellee

John F. McDermott, Counsel for Defendant-Appellee

Taylor, Porter, Brooks & Phillips, Counsel for Defendant-Appellee

Marie Healey, Counsel for Plaintiffs-Appellants and Plaintiffs

Gardner, Robein & Urann (formerly Gardner, Robein & Healey) (Former law firm of counsel for Plaintiff-Appellant)

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NO. 90-_____

In the Supreme Court
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IRON WORKERS MID–SOUTH PENSION FUND, LOUISIANA LABORERS HEALTH & WELFARE FUND AND LABORERS NATIONAL PENSION FUND,

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BORDEN CHEMICAL, A DIVISION OF BORDEN, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Iron Workers Mid-South Pension Fund, Louisiana Laborers Health & Welfare Fund and Laborers National Pension Fund, through undersigned counsel, respectfully request that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Fifth Circuit filed on January 5, 1990.

OPINIONS BELOW

The decision of the Fifth Circuit Court of Appeals affirming the district court decision preempting the Louisiana Private Works Act under ERISA is reported at 891 F.2d 548 (5th Cir. 1990), and appears as Appendix B to this Petition. The district court's opinion is reported at 700 F.Supp. 310 (M.D. La. 1988), and appears as Appendix C to this Petition.

JURISDICTION

The Court of Appeals entered its judgment in this case on January 5, 1990. The Court of Appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on February 7, 1990 (Appendix A hereto). This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 514(a) of ERISA, 29 U.S.C. §1144(a) (1982), provides in pertinent part:

> The provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Section 514(c)(2) of ERISA, 29 U.S.C. §1144(c)(2), defines the term "State" to include:

> A State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the

terms and conditions of employee benefit plans covered by this subchapter.

The Louisiana Private Works Act, in La. R.S. 9:4803(A), provides in pertinent part that its statutory privileges and claims secure payment of:

> Amounts owed under collective bargaining agreements with respect to a laborer's or employee's wages or other compensation for which a claim or privilege is granted and which are payable to other persons for vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, and other fringe benefits considered as wages by the Secretary of Labor of the United States in determining prevailing wage rates, unless the immovable upon which the work is performed is designed or intended to be occupied primarily as a residence by four families or less. Trustees, trust funds, or other persons to whom the employer is to make such payments may assert and enforce claims for the amounts in the same manner and subject to the same procedures provided for other amounts due laborers and employees granted a claim or privilege under this part.

STATEMENT OF THE CASE

Proceedings Below

Petitioners, two pension funds and one welfare fund, brought suit in the Middle District of Louisiana under Section 502 and Section 515 of ERISA, 29 U.S.C. §1132 and §1145, and under Section 301(a) and 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §185(a) and §186(c)(5), against a deliquent contractor, Terotechnology

Corporation, to collect deliquent fringe benefit contributions owed under a collective bargaining agreement with participating unions. Petitioners also stated an action against Borden Chemical, the property owner of the job site where the work was performed. This pendent party action against Borden was a state lien enforcement action brought under the Louisiana Private Works Act, La.R.S. 9:4801 et seq. Default judgment against Terotechnology was entered by the district court on November 5, 1987. Borden filed a motion to dismiss the Funds' action for lack of jurisdiction and, in a minute entry of March 14, 1988, which predated this Court's decision in *Finley v. United States*, ___ U.S. ___, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989), the district court ruled to retain jurisdiction over the state action against Borden pendent to the federal action against Terotechnology. The district court granted Borden's second motion to dismiss the Funds' claims on December 2, 1988, finding that these claims were preempted by ERISA. Final judgment of the district court was entered on March 27, 1989, whereafter petitioners lodged an appeal with the Fifth Circuit.

On January 5, 1990, the Fifth Circuit affirmed the dismissal by the district court below, holding that (1) the Funds may not assert a pendent party claim against Borden because there is no independent ground for subject matter jurisdiction over Borden; (2) the Funds' lien enforcement action stated a federal action under Section 502(a)(3) of ERISA, which preempted the state action; and (3) petitioners' action against Borden must therefore be dismissed. On January 19, 1990, petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied by the Fifth Circuit on February 7, 1990.

Facts

Petitioners Iron Workers Mid-South Pension Fund,

Louisiana Laborers Health & Welfare Fund, and Laborers National Pension Fund are jointly-administered, multiemployer employee benefit trusts and plans operating in the construction industry, which have been established for the purpose of providing and maintaining fringe benefits for employees of participating employers, pursuant to various collective bargaining agreements entered into by their sponsoring unions and various employers or employer groups whose members employ individuals reprenented by the Unions. The Trustees administering these Funds are representatives of signatory employers and participatory Unions, and administration of the Funds is accomplished in accordance with their respective trust agreements and pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq., the Labor Management Relations Act (the "Taft-Hartley Act"), 29 U.S.C. §186(c)(5), and various other federal statutory and regulatory laws.

On March 26, 1973, Borden entered into a Plant Maintenance Services contract with Terotechnology for repair and maintenance work to be performed at its Geismar, Louisiana plant. However, neither Borden, Terotechnology, nor any other third party ever secured and/or filed a bond to secure the performance of employees employed at the Geismar plant under the aforesaid Maintenance Services Contract.

On January 6, 1985, the Baton Rouge Building and Construction Trades Council, on behalf of the Plaintiff Unions, executed a collective bargaining agreement with Terotechnology for work to be performed at the Borden Chemical jobsite in Geismar, Louisiana. This Agreement required Terotechnology to submit fringe benefit contributions for each hour worked by its employees working under that agreement at the Borden jobsite and to deduct dues

from their wages for forwarding to the Unions.

Terotechnology did in fact submit reports and contributions to the Funds and the Unions, all in accordance with its collective bargaining agreement, through the middle of 1986. But thereafter, for the period August, 1986 through January, 1987, Terotechnology failed to fulfill its obligations under the collective bargaining agreement. Despite the entry of a judgment against Terotechnology in favor of the Funds and the Unions, the judgment was never satisfied.

Following Terotechnology's default on its contract with Borden, Borden terminated said agreement on February 14, 1987 and recorded a Notice of Termination on the mortgage records of Ascension Parish on February 18, 1987.

Thereafter, Petitioners timely filed liens on the public records of Ascension Parish, against both Borden, as owner of the property on which the work was performed, and against Terotechnology Corporation, as the contractor.

Accordingly, a delinquency action under ERISA was brought to recover the delinquent contributions and dues from the signatory contractor, Terotechnology, Inc. Petitioners' action against Borden sought to enforce payment of the liens timely recorded against the Geismar work for fringe benefit contributions and dues owed by Terotechnology.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ERISA PREEMPTION QUESTION OF EXCEPTIONAL IMPORTANCE TO MULTIEMPLOYER PLANS AND PARTICIPANTS WHICH THIS COURT SHOULD DECIDE

Absent action by this Honorable Court, the decision of the Fifth Circuit preempting the Louisiana Private Works Act under ERISA will severely impact the financial health and stability of multiemployer plans, participants, and beneficiaries, by prohibiting the plans' use of state lien laws, a frequently used mechanism for collecting delinquent contributions and delinquency judgments. ERISA plans have no alternative mechanisms to state lien laws with which to collect monies owed by defaulting contractors who are judgment proof.

The Fifth Circuit's prohibition on use of this mechanism as an aid to execution of judgments will lead to dilution of plan assets, increases in obligations of contributing employers, and loss of benefits to unionized employees, all clearly contrary to the expressed public policy of ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries. . . ." ERISA Preamble, Section 2(b), 29 U.S.C. §1001(b).

By virtue of the 1980 adoption of the Multiemployer Pension Plan Amendment Act, which amended Sections 515 and 502(g)(2) of ERISA, Congress further demonstrated its intent to protect the plans against employers' failure to meet their contractual obligations. As the Legislative history provides:

> Delinquencies of employers in making required contributions are a serious problem for most

> multiemployer plans, Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans . . . .
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy costs of delinquencies . . . .
>
> Recourse available under current law for collecting delinquent contributions is insufficient . . . .

Senate Labor Committee Summary and Analysis of Consideration of S.1076 (April, 1980), *see* 126 Cong.Rec. 23, 039 (1980) (remarks of Rep. Thompson): *id.* at 23,288 (remarks of Sen. Williams.)

Congress clearly presupposed that state law remedies, as well as federal remedies, be used to collect delinquent contributions. The original Legislative history underlying Section 502 states that: "[t]he intent of the Committee is *to provide the full range of legal and equitable remedies available in both state and federal courts* and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants." H.R. Rep. No. 93-533, 93rd Cong., 2nd Sess. 17, reprinted in [1974] U. S. Code Cong. and Admin. News, pages 4639, 4655. (Emphasis added). And the 1980 amendments did "not change any other type of remedy permitted under *state or federal law* with respect to delinquent multiemployer plan contributions." H.R. Rep. No. 869 (Part II) 96th Congress, Second Session 48-49, reprinted in [1980] U.S. Code Cong.

and Admin. News, 2993, 3038 (emphasis added).

Congressional intent to assist the plans by employing both state and federal remedies could not be more clearly established. Congress' concern for the well being of employees and their dependents as expressed in ERISA Section 2, the history of the Act's passage and legislative history of the 1980 amendments, all of which demonstrate Congress' policy to protect the financial stability of multiemployer plans, will be severely compromised if the plans are denied access to state lien laws in order to collect delinquencies and delinquency judgments.

The Fifth Circuit's decision will henceforth eliminate remedies available to plans, which include, in many states, liens upon building and trades construction and vessel construction, timber liens, transportation and warehouses liens, hotel and restaurant worker liens, manufacturing employee liens, and others. The existence and applicability of such statutes are traditionally matters regulated by the laws of the specific states, and do not, except in a very tenuous or remote way, affect ERISA plans.

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The Fifth Circuit's decision conflicts with *Mackey v. Lanier*, 486 U.S. 825, 108 S.Ct. 2182 (1988) and misinterprets *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987).

In *Mackey*, this Court recognized that ERISA's lack of a mechanism for enforcing judgments may be supplemented by state law mechanisms, including garnishment, to enforce judgments both in favor of and against an

ERISA welfare plan and/or its participants. ERISA *plans* may sue and be sued not only in matters involving enforcement of money judgments, but also in "run of the mill state law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan. . . ." *Id.* at 2187.

A suit to enforce the Private Works Act is no different from the "run of the mill" lawsuit recognized by *Mackey* as free from preemption,. The lien laws regulate non-ERISA parties—bonding companies, construction and general contractors, and property owners, in matters unrelated to ERISA: protection of a laborer's compensation and work product, and regulation of state property rights. The Louisiana lien laws do not in any manner affect or seek to regulate the administration, funding, reporting, disclosure, vesting, or the type or amount of benefits to be paid under ERISA plans. Clearly, under *Mackey*, the Funds are permitted to use state law procedures to *garnish* Borden in aid of execution of the judgment against Terotechnology for delinquent contributions. There is no reason, then, that attempts to enforce state lien laws, which essentially recognize Borden as a guarantor of Terotechnology's debt, should be deemed preempted.

Two courts, correctly applying the *Mackey* decision, agree. In *Plumbers Local 458 Holiday Vacation Fund v. Immel, Inc., Appleton Paper, Inc.*, 10 EBC 1806 (Wis. Cir. Ct. 1988), *affirmed* 11 EBC 1257 (Wis. Ct. App. 1989), the Wisconsin Appellate Court held that ERISA did not preempt an employee benefit fund from using the Wisconsin construction lien statute to collect unpaid employee benefit contributions from a general contractor, who, although not under contract with the funds, had assumed responsibility for payment of all labor obligations, including those of the subcontractors. Relying on *Mackey*, the court rejected defendant's argument that ERISA

preempts all attempts to use remedies provided by state law to collect obligations where employee benefit plans are involved:

> If plans may use state law to collect on a judgment against a plan, certainly ERISA does not preempt the plan's ability to use those procedures to collect a judgment on behalf of the plan.

Appleton, supra, 11 EBC at 1260. The court held, further, that the Wisconsin lien law is a "general statute without any specific reference to ERISA obligations . . . . . It is a remedy available to a certain class of creditors that transcends ERISA obligations and concerns." *Appleton, supra*, at 1260.

Further recognizing the import of lien laws to the financial health of ERISA plans, the Wisconsin court stated that:

> [a] decision holding that no general creditors' remedies may be utilized to collect judgments held by ERISA regulated plans would be unfathomable. This holding would often leave funds without the means to enforce judgments.

Appleton, supra, 11 EBC at 1260. The Wisconsin Court was correct in this analysis, as was the court in *Carpenters Health & Welfare Trust Fund v. Parnas Corp.*, 176 Cal.App.3d 1196, 222 Cal.Rpt. 668, 7 EBC 1031 (1986), in which the court held that an employee benefit fund's right to enforce a lien under California Civil Code Section 3111 for delinquent contributions was a remedy looked upon with favor by Congress, and one by no means inconsistent with or objectionable to ERISA. *Parnas, supra*, 7 EBC at 1035.

In *Carpenters Southern Calif. Administrative Dev. Corp. v. El Capitan Dev. Co.*, 197 Cal.App.3d 790, 243 Cal.Rpt. 132 (Cal. 1988), *cert. granted*, 246 Cal. Rpt. 209, 753 P.2d 1 (Cal. App. 1988), however, the California Court of Appeals held to the contrary, holding that state's lien law to be preempted. In large reliance upon this Court's decision in *Pilot Life, supra*, the California Court interpreted *Pilot Life* as requiring displacemnt of all state parallel remedies due to the exclusivity of ERISA's §502. *Accord: Prestridge v. Shinault*, 552 So.2d 643 (La.App. 2d Cir. 1989) (relying upon both *El Capitan* and the district court's opinion in the instant case).

In full agreement with *El Capitan, supra*, the Fifth Circuit similarly misinterpreted and improperly extended this Court's decision in *Pilot Life v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987). *Pilot Life* examined the enforcement scheme under ERISA Section 502, which was determined to be an exclusive mechanism for *participants'* or *beneficiaries'* allegations of improper claim processing by, or other benefit claims against, an ERISA plan. But *Pilot Life* did not address, and did not have before it, the issue of whether the enforcement scheme evidenced in Section 515, relating to *plans'* and *trustees'* actions to collect delinquent contributions, is exclusive.

The court below additionally failed to heed the pronouncements of this Court in *Mackey v. Lanier, supra*, that no such exclusivity applies to *plans*, which supplemental to the Act's civil enforcement scheme, may sue and be sued under state law mechanisms for enforcing judgments' and, considering Congress' established intent to provide to funds pursuing delinquency actions the full range of equitable remedies under both federal and state law, the Fifth Circuit clearly erred in extending *Pilot Life* to preempt a procedural mechanism available to plans under Louisiana lien laws for enforcing delinquency judgments.

Further, as discussed in greater depth *infra* in Section III hereof, the Fifth Circuit's decision also conflicts with the two-pronged test for preemption originally established in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895 (1981) which requires for preemption that a state law both "relate to" a plan and "purport[ ] to regulate, directly or indirectly, [its] terms and conditions . . . ." *Id.* at 525. Moreover, under *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983) the Fifth Circuit should not have preempted the Louisiana Private Works Act, which, if it affects ERISA plans at all, does so in "too tenuous, remote or peripheral a manner to trigger preemption." *Id.* at 100; *see also, Appleton, supra*, 10 EBC at 1814.

These conflicts with applicable United States Supreme Court decisions contained in the Fifth Circuit's rationale support review of the Fifth Circuit's decision by this Honorable Court.

III. THE FIFTH CIRCUIT'S DECISION ILLUSTRATES CONFLICTS AND CONFUSION AMONG THE COURTS IN DELINQUENCY CASES, AND ON THE STANDARDS FOR ERISA PREEMPTION IN GENERAL, WHICH SHOULD BE RESOLVED BY THIS HONORABLE COURT

The Fifth Circuit's decision in this case demonstrates a split and confusion among the courts concerning ERISA premption of state laws relating to collection of delinquent contributions and judgments, as well as the standards for ERISA premption in general, which whould be resolved by this Court.[1] The widely divergent

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1. To paraphrase this Court, given the statutory complexity of ERISA's premption provisions, and their wide effect on state law, it should not be surprising that the court is again called on to interpret these provisions. *Pilot Life, Inc. v. Dedeaux, supra*, 107 S.Ct. 1549, at 1553 (1987).

results achieved by the courts, especially concerning premption of lien laws, bodes ill for plans and participants, and prevents a uniform application of ERISA among the states.

For example, regarding state lien laws, compare the instant case with *Plumbers Local 458 Vacation Fund v. Immel, Inc., Appleton Paper, Inc., supra,* 11 EBC 1257 (Wis. Ct. App. 1989). both courts applied *Mackey* to reach completely opposite results on ERISA preemption of state lien laws. Other conflicting cases concerning preemption of actions for delinquent contributions include *Sasso v. Vachris,* 66 N.Y.2d 28, 494 N.Y.S.2d 856, 484 N.E.2d 1359 (1985) (New York statute providing remedy against shareholders of corporations for delinquent contributions not preempted under ERISA); *contra, Trustees of Sheet Metal Workers International Asso. Production Workers Welfare Fund v. Aberdeen Blower and Sheet Metal Workers, Inc.,* 559 F.Supp. 561 (E.D.N.Y. 1983) (New York statute providing remedy against corporate directors and officers for delinquent contributions held preempted); and *Upholsters International Union Health & Welfare Fund Trustees v. Pontiac Furniture, Inc.,* 647 F.Supp. 1053, 7 EBC 2120 (C.D.Ill. 1986) (Illinois statutory sanctions for delinquent contributions not preempted); *contra, Commonwealth v. Frederico,* 419 N.E.2d 1374, 2 EBC 2382 (Mass. 1981) (Massachusetts statute imposing snactions for nonpayment of contributions held preempted).

Based simply on these representative cases, it is clear that there is a conflict among the courts as to the proper preemption standards of state laws which assist in the collection or enforcement of delinquencies, which this Court should resolve.

The Fifth Circuit decision further indicates the ex-

istence of a broader controversy among the circuits as to the proper standard to be applied in ERISA preemption cases in general. In accord with the pronouncements of this Court, several circuits have adopted a two-prolonged test to determine if a state law is preempted by Section 514(a). The state law must "relate to" a plan under Section 514(a) *and* must "purport[ ] to regulate, directly or indirectly the plan's terms and conditions" under Section 514(c)(2). Under this test, which originated in *Allessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895 (1981), the Second and Ninth Circuits hold that the Section 514(c)(2) definition of "state" imposes a limitation on the "relate to" language of Section 514(a). *See e.g., Local Union No. 598 v. J. A. Jones Construction Co.*, 846 F.2d 1213, 1218 (9th Cir.), *affirmed* ____ U.S. ____, 109 S.Ct. 210 (1988); *Rebaldo v. Cuomo*, 749 F.2d 133, 137 n.1 (2nd Cir. 1984), *cert. denied* 472 U.S. 1008, 105 S.Ct. 2702 (1985). The Third circuit, on the other hand, in *McMahon v. McDowell*, 794 F.2d 100 (3rd Cir. 1986), *cert. denied*, 479 U.S. 971 (1986) used the broad "relates to" test to preempt wage payment laws. And, the Fifth Circuit in the instant case, while stating that it need not decide between the two tests, in effect applied the broader "relates to" test to preempt Louisiana's Private Works Act. Proper application of the two-pronged preemption standard in this case by the Fifth Circuit clearly would have produced a finding of no preemption, indicating the existence of a split, or at least confusion, among the circuit courts on this vital issue, which this Honorable Court should resolve.

Under the two-pronged test adopted by the Ninth and Second Circuits, statutes which create remedies without attempting to alter the terms of a plan itself, such as mechanics liens and other labor liens, should not be preempted. They simply do not "purport[ ] to regulate" the terms and conditions of any plan, being rather statutes of

general application often devised long before the enactment of ERISA.

The Court of Appeals for the Ninth Circuit relied upon the two pronged "relates to"—"purports to regulate" test in *Martori Bros. Distributors v. James-Massengale,* 781 F.2d 1349 (9th Cir. 1986), *amended* (on other grounds) 791 F.2d 799 (9th Cir.), *cert. denied,* 479 U.S. 949, 107 S.Ct. 435 (1986), to find state "make whole" awards sought to be enforced against employers and calculated by reference to ERISA plans' benefit structures, not to be preempted by ERISA. The Court reiterated a pertinent analysis previously explicated in its decision in *Scott v. Gulf Oil Corp.,* 754 F.2d 1499 (9th Cir. 1985):

> The state laws that have previously been found to be preempted by section 514(a) because they 'relate' to ERISA plans fall into four categories. First, laws that regulate the type of benefits or terms of ERISA plans.[ ] Second, laws that create reporting, disclosure, funding or vesting requirements for ERISA plans [ ]. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans.[ ] Fourth, laws and common law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.[ ] The principle underlying all of these decisions would appear to be that *the state law is preempted by section 514(a) if the conduct sought to be regulated by the state law is 'part of the administration of an employee benefit plan':* that is, *the state law is preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefits plans.*

Martori Bros., 781 F.2d at 1357-58. (Emphasis added.) The

Private Works Act in no manner seeks to regulate disclosure, funding, reporting, vesting, enforcement, or any other aspect of plan administration, and by the Second and Ninth Circuits' standards, preemption would thus not occur.

Review of the Louisiana Private Works Act clearly reveals that the statute is not designed to "regulate" plans at all: nothing could be further from its focus. Entitled "*Liability of Owners and Contractors for the Improvement of an Immovable*", the Act rather regulates how liability resulting from the exercise of protected privileges thereunder is to be apportioned and/or shifted between the contractor, the subcontractor, the owner, and the sureties of each, if any there are. *See generally, Comments* under La. R.S. 9:4802 et seq.

La. R.S. 9:4803(3) specifically provides that a laborer's privilege for amounts owed under collective bargaining agreements for "wages or other compensation . . . which are payable to other persons for . . . health and welfare, pension . . . and other fringe benefits considered as wages by the Secretary of Labor of the United States" under prevailing wage laws may be asserted and enforced by "Trustees, trust funds, or other persons to whom the employer is to make such payments in the same manner as may laborers and employees." It is clear that such third party trustees and trusts assert such claims not for their own labor but as third party beneficiaries for the labor of the employees who work under the aforementioned collective bargaining agreements. The statute does not "require", "mandate" or in any sense provide that any person or entity granted the statutory right to assert a privilege *must* do so: a trust fund is entirely free to exercise its discretion in this regard. To be sure, the Private Works Act protects employees' rights to be paid promptly for their

labor at the rate the contracting parties have already agreed in their collective bargaining agreement, and regulates who must bear the wage and fringe benefit contribution cost in the event the signatory contractor fails to pay. That payment is to be made to an ERISA plan rather than to the employees themselves is thus not the result of the state statute, but of the collective bargaining agreement under which the employee is working: the statute neither sets a particular contribution rate, impedes nor interferes with the Plan's administration, suggests how the plan may invest any contributions it may receive as a result of exercising its right to exert a state privilege against the work, nor dictates what benefits the plan must pay. It acknowledges quite simply that if an employee has already validly contracted that his fringe benefit contributions should be paid to another in trust for him, the State of Louisiana will honor that contractual promise, whatever its terms.

In these circumstances, the state action does not "purport[ ] to *regulate,* either directly or indirectly, the *terms and conditions* of employee benefit plans" [emphasis added] covered by Erisa, within the meaning of §514(c)(2). And such a failure inevitably must result in the statute's lack of any ability to "relate to" an employee benefit plan within the meaning of §514(a).

State lien laws, including Louisiana's Private Works Act, have long been in existence as a means of protecting a labaorer's paramount right to be paid for his services even when his employer fails to honor its obligation. Louisiana's lien law ensures that if injury is to be suffered at a construction project, it will not be the laborer or one (like the Funds) who stands in his shoes; the contractor and the property owner are called upon to stand in the employer's place and assume its burden, the law considering these par-

ties to be more able to withstand and protect against that loss than the individual laborer: these parties are in a position to contractually protect against the liability by requiring that retainage be held against a subcontractor's failure to pay the laborer's wages. The law also gives these parties an additional means to protect themselves: an owner or a contractor may nevertheless escape the secondary obligation by insuring against it. It is only when an owner fails or elects not to bond his project, as did Borden in this dispute, that he is called upon to fulfill the contractor's obligation himself.

This age old public policy of protecting the laborer against loss has no intent to impinge on the federal employee benefits field: it is representative of traditional state regulation of immovable property and those who create and enrich it: the laborer, the mechanic, the materialman. The secondary liability of the owner is not based upon his relationship to the employer or his obligations under the employer's contracts (which issues are regulated not only by ERISA but also by §301(a) and §302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §§185(a) and 186(c)(5). Rather it is based on state regulation of immovables and security rights which impinge upon ERISA plans only tangentially, in the same manner in which state laws regarding execution of judgments impinge upon ERISA plans. Accordingly, Louisiana's state lien laws should not be displaced.

As an alternative, in the event this Court determines that preemption is warranted, Louisiana's lien laws should be adopted, in part, into the federal common law of ERISA to permit delinquency actions to be filed against non-signatories to an agreement—for example, those deemed sureties under state lien laws. This Court recognized, in *Pilot Life Insurance Co. v. Dedeaux, supra*, 481 U.S. at 56,

107 S.Ct. at 1557, that federal courts possess the authority to develop a body of federal common law to govern issues in ERISA actions not covered by the Act itself. *See also,* discussion in *Springer v. Wal-Mart Associates Group Health Plan,* 714 F.Supp. 1168, 11 EBC 2495 (N.D. Ala. 1989), wherein the district court pleads for "Supreme Court reconciliation on the important, confusing and depressing subject of preemption", *id.*, 11 EBC at 2497, and advocates adoption of appropriate legal and equitable remedies as federal common law under ERISA. In *Textile Workers Union, v. Lincoln Mills of Alabama,* 353 U.S. 448, 77 S.Ct. 912 (1957), a seminal case interpreting §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185, this Court held that the federal courts were entitled to create substantive law to be applied in suits under §301(a) of the Act: a federal common law fashioned from "the policy of our national labor laws." *Id.* at 456. As sources for creation of this federal common law, in instances where a statute is silent, the court directed the lower courts to look "at the policy of the legislation" and fashion "a remedy that will effectuate that policy." *Id.* at 457. Compatible state law "may be resorted to in order to find the rule that will best effectuate the federal policy." *Id.*

Federal policy is clear in the instant case: protection of fund participants and beneficiaries is paramount. Delinquent contributions damage the viability of ERISA funds and cripple the well being of their participants and beneficiaries. Provision of enforcement mechanisms, which both Congress and this Court have expressly recognized as lacking under the express terms of ERISA, is a proper subject for development under federal common law. Accordingly, in the event this Court deems Louisiana's lien laws preempted, Petitioners respectfully request that this Court

adopt similar enforcement mechanisms into the federal common law of ERISA.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Fifth Circuit dated January 5, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition for Writ of Certiorari has been served upon the following by depositing copies of same in the U.S. Mail, first-class postage prepaid, this 4th day of May, 1990.

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MARIE HEALEY

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-3262

IRON WORKERS MID-SOUTH PENSION FUND, ET AL.,
Plaintiffs-Appellants,

versus

TEROTECHNOLOGY CORP., ET AL.,
Defendants,

BORDEN CHEMICAL,
Defendant-Appellee.

FILED
FEB 7 1990

Appeal from the United States District Court for the Middle District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 5, 5 Cir., 1990, ____F.2d____)

(February 7, 1990)

Before LIVELY,[1] JOLLY and HIGGINBOTHAM, Circuit Judges.

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1. Circuit Judge of the Sixth Circuit, sitting by designation.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

/s/ Illegible
United States Circuit Judge

REHG-8

APPENDIX B

IRON WORKERS MID—SOUTH
PENSION FUND, et al.,
Plaintiffs-Appellants,

v.

TEROTECHNOLOGY CORP., et al.,
Defendants, Borden Chemical,
Defendant-Appellee.

No. 89-3262.

United States Court of Appeals,
Fifth Circuit.

Jan. 5, 1990.

Rehearing and Rehearing En Banc
Denied Feb. 7, 1990.

Employee benefit plans brought suit against contractor which failed to make contributions to plans as required under collective bargaining agreements and against owner of property on which contractor had done work, seeking to collect contributions. Property owner's motion to dismiss was granted by the United States District Court for the Middle District of Louisiana, 700 F.Supp. 310, Frank J. Polozola, J., and plans appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that Louisiana Private Works Act permitting employee benefit plans and fiduciaries to assert claim for amounts owed under collective bargaining agreements against owner of property on which employer has worked was preempted by ERISA.

Affirmed.

Marie Healey, New Orleans, La., for plaintiff-appellants.

James L. Ellis, Taylor, Porter, Brooks & Phillips, Thomas R. Peak, John F. McDermott, Baton Rouge, La., for defendant-appellee.

Appeal From the United States District Court for the Middle District of Louisiana.

Before LIVELY,[1] JOLLY, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Employee benefit funds appeal from the dismissal of their suit to enforce liens recorded against Borden's Geismar plant pursuant to the Louisiana Private Works Act for employee benefit plan contributions owed by Borden's contractor, Terotechnology. The district court dismissed under Fed.R.Civ.P. 12(b), holding that insofar as it pertained to employee benefit plans, the Private Works Act was preempted by ERISA, 29 U.S.C. § 1001 *et seq.* Because the Private Works Act creates an additional method for enforcing the funding requirements of employee benefit plans it is preempted, and we affirm.

I

On March 26, 1973, Borden Chemical entered into a plant maintenance services contract with Terotechnology

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1. Circuit Judge of the Sixth Circuit, sitting by designation.

Corporation for work to be performed at its Geismar, Louisiana plant. On January 6, 1985, the Baton Rouge Building and Construction Trades Council, on behalf of three unions, executed a collective bargaining agreement with Terotechology for work to be performed at the Borden jobsite in Geismar. This agreement required Terotechnology to submit fringe benefit contributions to nine employee benefit funds for each hour worked by its employees under that agreement at the Borden jobsite, and to deduct dues from their wages for forwarding to the unions.

Terotechnology did submit reports and contributions to the funds and the unions in accordance with its collective bargaining agreement through the middle of 1986. But thereafter, for the period August 1986 through January 1987, Terotechnology failed to fulfill its obligations under the collective bargaining agreement. Following Terotechnology's default on its contract with Borden, Borden terminated the agreement on February 14, 1987. Liens were timely filed by the unions and funds under the Louisiana Private Works Act on the public records of Ascension Parish, against both Borden, as owner of the property on which the work was performed, and Terotechnology, as the contractor and employer, for the amounts owed by Terotechnology.

On August 5, 1987, the unions and funds filed a deliquency action to recover the deliquent contributions and dues from Terotechnology. This action was asserted pursuant to § 515 and § 502 of ERISA and § 302(c)(5) of the LMRA. The unions and funds also sued Borden seeking to enforce the liens recorded against the Geismar plant for fringe benefit contributions and dues owed by Terotechnology.

On September 29, 1987, Borden filed a motion to

dismiss, contending that the district court lacked jurisdiction over the unions' and funds' claims against it. The unions and funds asked the court to exercise pendent jurisdiction over their state law claims based upon the federal claims against Terotechnology. A default judgment was entered against Terotechnology on November 5, 1987. On November 16, 1987, the district court denied Borden's motion to dismiss.

On July 29, 1988, Borden filed a second motion to dismiss the unions' and funds' claims pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, contending that the complaint failed to state a claim upon which relief could be granted against Borden because ERISA § 514(a) expressly preempts state laws such as La.R.S. 9:4801 *et seq.*, which relate to employee benefit plans. Borden also argued that under the facts of this case no cause of action existed against it under ERISA because it was not an "employer" who can be sued for deliquent contributions under ERISA. The unions and funds opposed this motion, contending that their claims were not preempted, but they conceded that no ERISA cause of action existed against Borden.

On December 2, 1988, *Iron Workers Mid-South Pension Fund v. Terotechnology Corp., et al*, 700 F.Supp. 310 (M.D.La. 1988), Borden's Rule 12(b) motion was granted and the claims of six funds were dismissed. The district court held that the Private Works Act was preempted by ERISA insofar as it was applied to employee benefit plans. Subsequently, the claims of the remaining unions and funds were voluntarily dismissed with prejudice, and final judgment was entered by the district court on March 27, 1989. Only the Iron Workers Mid-South Pension Fund, Laborers National Pension Fund, and Louisiana Laborers Health & Welfare Fund appealed the district court's

decision.

II

A. *Jurisdiction*

[1] The parties assert two possible bases for federal jurisdiction. First, the parties assert that there is "pendent party" jurisdiction over the funds' state law cause of action against Borden. They argue that since the federal court had jurisdiction over the federal claims against Terotechnology, it also had jurisdiction over state law claims against nondiverse Borden beacause the claims arose out of a common nucleus of operative fact. This is not correct in light of the Supreme Court's recent decision in *Finley v. United States*, ___ U.S. ___, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). Although the claims brought by the funds against Terotechnology were exclusively federal,[2] there was no independent ground for subject matter jurisdiction over Borden.

"As regards all courts of the United States inferior to [the Supreme Court], two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it. . . . To the extent that such action is not taken, the power lies dormant.*"

Finley, 109 S.Ct. at 2006, quoting *The Mayor v. Cooper*, 6 Wall. 247, 252, 18 L.Ed. 851 (1868). The Supreme Court held in *Finley* that while pendant-party jurisdiction may pass constitutional muster, it has not been congressionally authorized. *Id.* 109 S.Ct. at 2006-07. It is not

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2. The Funds are fiduciaries under § 502(a)(3) and were suing to enforce the terms of the plans. *See* 29 U.S.C. § 1132(c)(1); *Livolsi v. Ram Construction Co.* 728 F.2d 600, 602 (3d Cir.1983).

enough to confer jurisdiction over pendent parties that the plaintiff's case against one defendant can only be brought in federal court. *Id.* at 2008. ERISA § 502(e), 29 U.S.C. § 1132(e), provides that ". . . the district courts of the United States shall have exclusive jurisdiction of civil actions *under this subchapter* brought by . . . [a] fiduciary" (emphasis added). ERISA does not authorize suit against property owners to enforce liens against the property to aid collection of deliquent contributions, however, so there is no statutory grant of jurisdiction over parties such as Borden.

Alternatively, Borden asserts that this case comes within the rule of *Avco Corp. v. Machinists,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), as that rule was recently applied by the Supreme Court to certain ERISA premption defenses in *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987). *Avco* holds that a state law cause of action is a well-pleaded federal claim when Congress has so completely preempted an area of the law that any civil complaint raising this select group of preempted claims is necessarily federal in character. In *Taylor* the Supreme Court held that under *Avco* a state law cause of action that is within the scope of the civil enforcement provisions of ERISA § 502(a) was a well-pleaded federal claim. *Id.* 107 S.Ct. at 1548.

Section 502(a), 29 U.S.C. § 1132(a) provides:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in sub-section (c) of this section, or

(B) to recover benefits due to him under the

terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under sectin 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this sub-chapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

The funds are fiduciaries, and attempt to enforce the provisions of ERISA, specifically § 515, 29 U.S.C. § 1145[3], and § 502(g)(2), 29 U.S.C. § 1132(g)(2).[4] The suit by the

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3. *§ 515, 29 U.S.C. § 1145 provides:*

§ 1145. Deliquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

4. *§ 502(g)(2), 29 U.S.C. § 1132(g)(2) provides:*

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgement in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contribution,
(B) interest on the unpaid contributions,
(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

funds under the Louisiana Private Works Act is preempted because the claims for deliquent contributions are within the scope of the civil enforcement provisions of ERISA, which are exclusive. *Taylor* holds that the federal courts have jurisdiction over such suits. 107 S.Ct. at 1548.

B. *Preemption*

Section 514(a) of ERISA preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Section 514(c) defines the terms used in § 514(a):

> (1) The term "State law" includes all law, decisions. rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this sub-chapter.

Footnote 4 continued.

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under sub-paragraph (A).

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

29 U.S.C. § 1144(c).

The funds contend that these statutory provisions require that a two-prong test be used to determine if a state law is preempted by § 514(a). The state law must "relate to" a plan *and* must "purport to regulate, directly or indirectly," its terms or conditions. They argue that, as applied in this case, the Louisiana statute, although it may relate to employee benefit plans, does not purport to regulate their terms.

The Second and Ninth Circuits have read § 514(c)(2)'s definition of "state" to imposes a limitation upon the "relate to" language of § 514(a). *See Local Union No. 598 v. J. S. Jones Constr. Co.*, 846 F.2d 1213, 1218 (9th Cir.), *aff'd*, ____ U.S. ____, 109 S.Ct. 210, 102 L.Ed.2d 202 (1988); *Martori Bros. Distribr. v. James-Massengale*, 781 F.2d 1349, amd. 791 F.2d 799 (9th Cir.), *cert. denied*, 479 U.S. 949, 107 S.Ct. 435, 93 L.Ed.2d 385 (1986); *Rebaldo v. Cuomo*, 749 F.2d 133, 137 & n. 1 (2d Cir.1984), *cert. denied*, 472 U.S. 1098, 105 S.Ct. 2702, 86 L.Ed. 2d 718 (1985); *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir.1984); *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir.1982), *aff'd mem. sub nom., Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220, 103 S.Ct. 3564, 77 L.Ed.2d 1405 (1983). In *J.A. Jones* the court stated that "[t]he narrower 'purports to regulate' test is included within the broader 'relates to' test." 846 F.2d at 1218, citing *Martori Bros.*, 781 F.2d at 1359.

[2] The only Supreme Court case mentioning the definition of "state" is *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981), in which the Court addressed whether a New Jersey law purporting to prohibit the reduction of a retiree's pension benefits by the amount of worker's compensation benefits

he received before retirement was preempted by ERISA. While rejecting the Court of Appeals' rationale, which focused on the purpose of the New Jersey law, the Court affirmed its finding of preemption, concluding that the New Jersey statute related to employee benefit plans" because it eliminate[d] one method for calculating pension benefits—integration—that is permitted by federal law." *Id.* at 524, 101 S.Ct. at 1906. The Court also stated:

> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law, rather than directly, through a statute called 'pension regulation.' ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. For the purposes of the preemption provision, ERISA defines the term 'State' to include: 'a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly,* the terms and conditions of employee benefit plans covered by this subchapter.' 29 U.S.C. § 1144(c)(2) (emphasis added). ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision.

Id. at 525, 101 S.Ct. at 1907 (emphasis in original). Thus, it is irrelevant that the Louisiana Private Works Act is a lien statute, indirectly affecting pension plans, rather than a statute directly regulating pension plans.

The ERISA preemption decisions by the Supreme Court have limited their discussion to the "relate to" language of § 514(a), reading that language broadly. *See, e.g. Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549, 1553, 95 L.Ed.2d 39 (1987) (asserting that a law relates to an employee benefit plan if it "has a connection

with or reference to such a plan"). Following *Pilot Life,* this court noted the breadth of the preemption language of § 514(a) in *Cefalu v. B.F. Goodrich Co.:*

> [C]ourts have broadly construed the words 'relate to" in order to give the proper effect to the preemption language of ERISA. . . . ERISA's preemption clause should not 'be interpreted to preempt only state laws dealing with the subject matters covered by ERISA.' Instead, ERISA's preemption of state law claims 'depends on the conduct to which such law is applied, not on the form or label of the law.' The courts have indicated that 'even indirect state action bearing upon private pensions may encroach upon the area of exclusive federal concern.' Because of the breadth of the preemption clause and the broad remedial purpose of ERISA, 'state laws found to be beyond the scope of [§ 514(a)] are few.'

871 F.2d 1290, 1293-94 (5th Cir.1989) (citations omitted). Borden contends that *Cefalu, Pilot Life,* and the other Supreme Court cases interpreting § 514(c), require only that a law relate to employee benefit plans to be preempted, and preclude a two-prong test under § 514(a).

[3] We need not decide in this case whether or not the two-prong test must be met in order for a state law to be preempted by ERISA, for the Louisiana Private Works Act is preempted under either the two-prong test or the broader "relates to" test. By its terms the Private Works Act relates to employee benefit plans. It also purports to regulate such plans, because it provides a supplemental enforcement mechanism to those provided by Congress. It does no specifically require that certain terms be included in a plan, but it does purport to regulate the conditions under which the terms of a plan can be enforced by creating

an additional entity that can be liable for contributions to the plan.

In *Martori Bros.*, the Ninth Circuit discussed the kinds of state laws which have been found to "relate to" employee benefit plans:

> The state laws that have previously been found to be preempted by section 514 (a) because they 'relate' to ERISA plans fall into four categories. First, laws that regulate the type of benefits or tems of ERISA plans. Second, laws that create reporting, disclosure, funding or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common law rules that provide remedies for misconduct growing out of the administration of the ERISA plan. The principle underlying all of these decisions would appear to be that the state law is preempted by section 514(a) if the conduct sought to be regulated by the state law is 'part of the administration of an employee benefit plan': that is, the state law is preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefits plans.

781 F.2d at 1357-58 (footnotes omitted). The funds suggest that the Private Works Act is distinguishable from all of the statutes which previously have been found to be preempted by ERISA, because it does not "regulate[ ] the matters regulated by ERISA: disclosure, funding, reporting, vesting and enforcement of benefit plans." *Id.* at 1358.

The funds' contention is clearly incorrect because the Private Works Act specifically attempts to regulate the

funding of employee benefit plans, and attempts to provide an enforcement mechanism not provided by ERISA. The Second and Ninth Circuits have held that when a law "add[s] an additional statutory requirement. . . . to a private employee benefit plan" it is clearly preempted by ERISA. *Local Union 598 v. J.A. Construction Co.*, 846 F.2d at 1219; *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d at 329.

In *Carpenters Southern California Admin. Corp. v. El Capitan Serv. Co.*, 197 Cal.App.3d 790, 243 Cal.Rptr. 132 (Cal.App.1988), *cert. granted*, 246 Cal.Rptr. 209, 753 P.2d 1 (1988), the California Court of Appeals held that the California mechanics' lien law, which specifically provided a lien right against real property for supplemental fringe benefit payments owed to employee trust fund pursuant to a collective bargaining agreement, was preempted by ERISA.[5] Although the court had earlier concluded that the lien statute was not preempted, it was ultimately persuaded to reverse its decision following the California

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5. There have been four state cases addressing the preemption of a state lien statute by ERISA. Two have determined that the lien statutes were not preempted, *Plumbers Local 458 Vacation Fund v. Howard Immel, Inc.* 151 Wis.2d 233, 445 N.W.2d 43 (Wisc.Ct.App.1989); *Carpenters Health & Welfare Trust Fund v. Parnas Corp.*, 176 Cal.App.3d 1196, 222 Cal.Rptr. 668 (Calif.Ct.App.1986), and two have found preemption. *El Capitan, supra; Prestridge v. Shinault*, 552 So.2d 643 (La.App.2d Cir.1989). In *Parnas*, the court considered whether ERISA preempted California Civil Code § 3111, a statute similar to Louisiana's Private Works Act. Using the two-prong test, the court concluded that "ERISA *does preempt* any state interference, directly or indirectly, in respect of the 'terms and conditions' of employee benefit plans; it *does not preempt* state lawsuits . . . to 'enforce' such 'terms and conditions,' and thus recover delinquent ERISA contributions." *Id.* 176 Cal.App.3d at 1198, 222 Cal.Rptr. 668, 7 EBC at 1034, *Parnas* was decided before the Supreme Court's decisions in *Pilot Life* and *Taylor*, and was not followed by the California court in *El Capitan*.

Supreme Court's transfer of the appeal to it for recommendation as to the impact of *Pilot Life*. The court concluded that the *Pilot Life* decision could not be read without determining that "the high court was purposely broad in its view of preemption." *El Capitan*, 197 Cal.App.2d at 795, 243 Cal.Rptr. 132. The court read *Pilot Life* as establishing the principle that ERISA's § 502 remedies are exclusive, requiring displacement of any state law affording a parrallel remedy. *Id.* at 796, 243 Cal.Rptr. 132. The court stated:

> Although a state law providing for mechanics' liens is a special statutory collection alternative, that remedy cannot be divorced from the substantive contractual rights which create the debt. To be effective, the lien claim depends upon the validity and consequences of an agreement of some sort. In this instance, a labor agreement is the subject matter. Failure of one party to the plan to make contributions results in the denial of benefits to the others. Federal remedies are provided. Mechanics' lien rights are omitted.

Id.

The funds argue that we should not adopt the *El Capitan* court's reading of *Pilot Life*. They assert that *Pilot Life* cannot be read to preempt state law actions to collect deliquent contributions, since the § 502 enforcement scheme before the Court in *Pilot Life* was only determined to be the exclusive mechanism for enforcing the claims of a participant or a beneficiary involving improper claim processing by a plan or other benefit-related claims against a plan.[6] *Pilot Life* dealt primarily with the enforcement pro-

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6. The argument that only laws relating to benefits, and not contributions, are preempted was rejected by the Ninth Circuit in *Local Union*

visions of § 502 as they related to suits by participants and beneficiaries for benefits, and did not specifically address whether the enforcement scheme giving a plan and its trustees a right of action againsst a contributing employer provides the exclusive mechanism for collecting delinquent contributions. Nonetheless, the reasoning behing *Pilot Life's* holding that ERISA preempted the participant's state law claims for enforcement of the plan applies equally well to the present case. The Supreme Court noted that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life,* 107 S.Ct. at 1552, quoting *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 523, 101 S.Ct. 1895, 1906, 68 L.Ed.2d 402 (1981).

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme. . . . The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-olan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide stsrong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."

Pilot Life, 107 S.Ct. at 1556, quoting *Massachusetts*

Footnote 6 continued.

598 v. J.A. Jones Constsr. Co., 846 F.2d 1213, 1219 (9th Cir.1988). the court held that "[t]his 'contribution/benefit' dichotomy, while superficially appealing is unsupported by the law." *Id.*

Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 146, 105 S.Ct. 3085, 3092, 87 L.Ed.2d 96 (1985). It is no different when the claim is one for delinquent contributions brought by a fund or trustee. One of the "six carefully integrated civil enforcement provisions found in § 502(a)" is § 502(a)(3), which provides that a civil action may be brought:

> (3) by a participant, beneficiary or *fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.*

29 U.S.C. § 1132(a)(3) (emphasis added). This is precisely the type suit brought by the funds—a civil action by a fiduciary to enforce the provisions of ERISA with regard to employer contributions, i.e. § 515, 29 U.S.C. § 1145, and to enforce the terms of the plan, i.e. the funding contributions required by the collective bargaining agreement. The Louisiana Private Works Act is therefore preempted because it attempts to supplement the exclusive civil remedies provided by ERISA.

The funds make several additional arguments. First, they argue that the Louisiana Private Works Act comes within the rule of *Mackey v. Lanier Collections Agency,* 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), as an aid to the enforcement of a judgment. In *Mackey,* the Court held that Georgia's garnishment statute, as a generally applicable mechanism for the enforcement of judgments, was not preempted by ERISA. Under *Mackey,* state law enforcement mechanisms can be used to collect judgments against plan participants from funds due participants through ERISA benefit plans. 108 S.Ct. at 2188. In *Plumbers Local 458 Holiday Vacation Fund v. Howard Immel, Inc.,* 151 Wis.2d 233, 445 N.W.2d 43 (App.1989), the court relied on *Mackey* in holding that a Wisconsin lien

statute was not preempted by ERISA, reasoning that "a decision holding that no general creditor's remedies may be utilized to collect judgments held by ERISA-regulated plans would be unfathomable." *Id.* 445 N.W.2d at 46. We are unpersuaded by the Wisconsin court's analysis, for the lien statutes involved do more than provide remedies for collecting judgments; they create substantive rights. The Louisiana Private Works Act gives ERISA plans as well as employees and laborers rights against not only employers, but property owners such as Borden.[7] Significantly, in holding that it was not preempted, the *Mackey* Court noted that the Georgia garnishment statute "creates no substantive causes of action, nor new bases for relief, or any new grounds for recovery; [it] does not create the rule of decision in any case affixing liability." *Id.* 108 S.Ct. at 2188 n. 10. Louisiana's Private Works Act cannot be brought under the authority of *Mackey*, because without it Borden, who is not an employer, would not be liable to the funds. The Private Works Act creates a substantive right against the property owner that is not created by ERISA,

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7. The Louisiana Private Works Act provides, in pertinent part:

> Amounts owed under collective bargaining agreements with respect to a laborer's or employee's wages or other compensation for which a claim or privilege is granted and which are payable to other persons for vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, and other fringe benefits considered as wages by the secretary of labor of the United States in determining prevailing wage rates, unless the immovable upon which the work is performed is designed or intended to be occupied primarily as a residence by four families or less. Trustees, trust funds, or other persons to whom the employer is to make such payments may assert and enforce claims for the amounts in the same manner and subject to the same procedures provided for other amounts due laborers or employees granted a claim or privilege under this part.

La.Rev.Stat.Ann. § 9:4803(A)(3) (West 1983).

and goes beyond being merely a means of enforcing a judgment.

Second, the funds argue that if the Louisiana Private Works Act does affect the federal scheme contemplated by ERISA at all, it does so in too tenuous, remote, and peripheral a manner to trigger preemption. They rely on a statement in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901 n. 21, 77 L.Ed.2d 490 (1983), to the effect that laws affecting the ERISA scheme only remotely would not be preempted. The statement in the *Shaw* footnote has been applied in few cases and is not applicable here. The Private Works Act does not merely remotely or tenuously affect ERISA plans, but has a substantial effect, for it creates an additional party who can be liable to plans for contributions.

Third, the funds argue that the legislative history of ERISA indicates that Congress intended to preserve state lien laws as a plan remedy. However, the legislative history cited by the funds is ambiguous at best, and does not indicate that there was any intention of allowing states to create new substantive rights.

Finally, the funds argue that even if the Louisiana Private Works Act would otherwise be preempted by § 514(a), it is saved by § 514(b)(2), the insurance savings clause. This argument is meritless. Applying the three criteria used by the courts to determine whether a state law is "saved," it is clear that the Louisiana statute does not regulate insurance. The law does not have the "effect of transferring or spreading a *policy holder's risk*"; the law is not "an integral part of the *policy relationship*"; and the law is clearly not "limited to entities within the *insurance industry.*" *See Pilot Life*, 107 S.Ct. at 1553-54, citing *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct.

3002, 3008, 73 L.ED.2d 647 (1982). The Private Works Act has nothing to do with insurance, and is not saved from preemption on this basis.

III

The Louisiana Private Works Act relates to ERISA plans by its terms, as it provides an alternative method to enforce the collection of contributions owed to plans. It also purports to regulate the terms and conditions of plans by creating an additional party other than an employer who can be held liable for those contributions. Therefore, the Louisiana Private Works Act is preempted by ERISA. The Act does not merely create the right to use a lien to enforce a judgment, nor is its effect on the federal scheme tenuous, remote, or peripheral. Finally, the Act is not "saved" from preemption by the insurance savings clause, for it has nothing to do with insurance. Accordingly, the district court was correct in dismissing the complaint against Borden.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

IRON WORKERS MID-SOUTH PENSION FUND, ET AL — CIVIL ACTION

VERSUS — NUMBER 87-660-B

TEROTECHNOLOGY CORPORATION, ET AL

RULING ON BORDEN CHEMICAL'S MOTION TO DISMISS

Borden Chemical ("Borden") employed a contractor, Terotechnology Corporation ("Terotechnology") to perform work on certain property which was owned by Borden. During this period of time, Terotechnology was obligated under a collective bargaining agreement to make contributions to certain employee pension plans. It is clear that Borden was not a party to this collective bargaining agreement nor was it otherwise obligated to make contributions to the benefit plans. Borden simply owned certain property on which Terotechnology had a contract to perform work. After Terotechnology failed to make contributions as required under the bargaining agreements, plaintiffs[1] filed suit against Terotechnology and Borden

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1. Plaintiffs in this motion are Iron Workers Mid-South Pension Fund, Iron Workers Welfare Fund, Laborers National Pension Fund, Louisiana Laborers Health and Welfare Fund, Millwrights Local No. 720 Pension Fund, and I.B.P.A.T. Local 728 Health and Welfare Fund. Not involved in this motion are the claims of the Construction & General Laborers Local 1177, Millwrights & Machinery Erectors Local Union No. 720, and IUOE Local Union No. 406 which seek payment of dues deducted from the employees' wages.

seeking to recover contributions which should have been made to the employee pension funds by the workers' employer, Terotechnology. Plaintiffs filed suit against Terotechnology under the Employee Retirement Income Security Act, 29 U.S.C. § 1132 ("ERISA"). The claim against Borden was brought pursuant to the Louisiana Private Works Act, La. R.S. 9:4801 et seq. and specifically under § 4803 of that act. Plaintiffs contend that since Borden owns the facility on which the contractor was to perform work, it is liable to the employees for the contributions which Terotechnology should have paid to the plans.

This matter is now before the Court on a motion to dismiss filed by Borden pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. Borden contends that the complaint fails to state a claim upon which relief can be granted because ERISA expressly preempts state laws such as R.S. 9:4803 which "relate to" an employee benefit plan. Borden also contends that no cause of action exists under ERISA against it because Borden was only a property owner who was a non-signatory to a collective bargaining agreement and, therefore, was not an "employer" under the Act.

Thus the first issue the Court must consider is whether or not ERISA preempts La. R.S. 9:4803.[2]

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2. La. R.S. 9:4803 provides in part:

A. The privileges granted by R.S. 9:4801 and the claims granted by R.S. 9:4802 secure payment of:

(3) Amounts owed under collective bargaining agreements with respect to a laborer's or employee's wages or other compensation for which a claim or privilege is granted and which are payable to other persons for vaction, *health and welfare, pension* apprenticeship and training, supplemental unemployment benefits and other fringe benefits considered as wages by the secretary of labor of the United States in

ERISA's preemptive provision is set forth at 29 U.S.C. § 1144(a) and states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

The Court must look to congressional intent to determine whether or not a state law is preempted by a federal law. *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 208, 105 S.Ct. 1904, 1909 (1985). It is clear that the preemptive language used by Congress in ERISA is explicit and broad in scope and provides: "all State laws insofar as they . . . relate to any employee benefit plan" are pre-empted. By using this language, Congress clearly intended to establish pension plan regulation as exclusively a matter of federal concern. *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 523, 101 S.Ct. 1895, 1906 (1981). Furthermore, the United States Supreme Court stated in *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 98, 103 S.Ct. 2890, 2900 (1983):

> The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee

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Footnote 2 continued.

determining prevailing wage rates, unless the immovable upon which the work is performed is designed or intended to be occupied primarily as a residence by four families or less. *Trustees, trust funds, or other persons to whom the employer is to make such payments may assert* and enforce claims for the amounts in the same manner and subject to the same procedures provided for other amounts due laborers or employees granted a claim or privilege under this Part. (emphasis added)

> rejected these provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language.

Thus, it is clear that Congress intended the preemption provision of ERISA to have an expansive reach. In addition, the courts have broadly construed the words "relate to" in order to give proper effect to the preemption language of ERISA. In *Pilot Life v. Dedeaux*, 481 U.S. 41, ____, 107 S.Ct. 1549, 1553 (1987), the United States Supreme Court stated:

> In both *Metropolitan Life, supra*, and *Shaw v. Delta Air Lines, Inc., supra*, 463 U.S. at 96-100, 103 S.Ct., at 2899-2901, we noted the expansive sweep of the pre-emption clause. In both cases "[t]he phrase 'relate to' was given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan ' 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.' " (citation omitted) In particular we have emphasized that the pre-emption clause is not limited to "state laws specifically designed to affect employee benefit plans."

Therefore, the Court finds that La. R.S. 9:4830, as employed by plaintiffs in this case, falls within the preemptive scope of § 1144(a) of ERISA as state law which "relates to" an employee benefit plan. La. R.S. 9:4803 makes direct reference to health and welfare and pension benefits and purports to provide a mechanism for the assertion and enforcement of claims to these benefits. In fact, the plaintiffs in this suit are attempting to utilize this state statute to collect unpaid contributions to their employee benefit plan. In *McMahon v. McDowell*, 794 F.2d 100 (3rd

Cir. 1986), *cert. denied*, 107 S.Ct. 473, the court held that state laws relating to covered benefit plans, "even those that are arguably consistent with the goals of ERISA, are preempted by Section 514(a), 29 U.S.C. §1144(a)." *Id.* at 108. In *McMahon*, former employees sought to recover unpaid wages, pension contributions, and fringe benefits allegedly owed to them under ERISA, the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 Pa. Cons. Stat. § 260.1 et seq. (Supp. 1985), and state contract law. The court held that the WPCL, "as employed by plaintiffs, plainly relates to . . . pension plans and therefore is preempted by Sectin 514(a), 29 U.S.C. §1144(a). In sofar as the WPCL authorizes the liability of [defendant] . . . for unpaid employee benefit plan obligations, it obviously relates, refers, and pertains to the underlying employee benefit plans." *Id.* at 106. The court went on to state that the WPCL "does not merely relate to . . . pension plans, it competes with the [recovery] mechanism that Congress carefully established in ERISA itself . . . Plaintiffs are here attempting to avoid ERISA's mechanisms for enforcing benefit plan contributions and to substitute instead a state regulation that circumvents the scheme carefully devised by Congress." *Id.* at 107.

Having concluded that ERISA applies in this case, the Court must next determine whether or not plaintiffs have a cause of action under ERISA against Borden. As noted earlier, Borden is a property owner who is a nonsignatory to the collective bargaining agreement which obligates Terotechnology to make contributions to the various pension plans. Section 1145 of ERISA imposes a statutory obligation on an "employer"[3] to make contribu-

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3. 29 U.S.C. § 1002(5) defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

tions to a benefit plan that are required by a collective bargaining agreement. Plaintiffs concede that Terotechnology was the employer, signatory to the collective bargaining agreement, and the entity obligated to make the contributions to the employee benefit plans sought herein. The plaintiffs further concede that Borden was simply the owner of property on which Terotechnology contracted to perform work. Plaintiffs do not contend that Borden is either the employer of the plan participants or a signatory to any collective bargaining agreement. In *Carpenters Southern California Administrative Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984)[4] the court stated that "we find no evidence in the legislative history of ERISA or its 1980 amendments that a non-signatory property owner whose holdings are subject to a state mechanic's lien was intended as a proper defendant in an action to enforce the employer's obligations." *Id.* at 1346. Thus the Court finds that plaintiffs have no cause of action against Borden under ERISA. The Court must note that plaintiffs have conceded in their brief that the owner of property at which work is performed is not an "employer" under ERISA and no action for delinquent contributions exists under ERISA against such an entity. Indeed, plaintiffs state that this is precisely the reason why their cause of action against Borden was brought under state law and not under ERISA.

In summary, the Court finds that ERISA preempts La. R.S. 9:4803. The Court further finds that plaintiffs have no cause of action under ERISA against Borden.

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4. See also Chicago Dist. Council of Carpenters Pension Fund v. Strom, 634 F. Supp. 163 (N.D. Ill. 1986).

Therefore:

IT IS ORDERED that the motion of Borden Chemical to dismiss be and it is hereby GRANTED.

Baton Rouge, Louisiana, December 2, 1988.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

IRON WORKERS MID–SOUTH PENSION FUND, ET AL	:	CIVIL ACTION
VERSUS	:	NO. 87-660
TEROTECHNOLOGY CORPORATION AND BORDEN CHEMICAL	:	SECTION "B"

FILED
MARCH 27 1989

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that final judgment be entered dismissing all claims herein of Plaintiffs IRON WORKERS MID-SOUTH PENSION FUND, IRON WORKERS WELFARE FUND, IRON WORKERS LOCAL 623 EDUCATIONAL & TRAINING PROGRAM TRUST FUND, LABORERS NATIONAL PENSION FUND, LOUISIANA LABORES HEALTH & WELFARE FUND, LOUISIANA LABORERS LOCAL 1177 APPRENTICESHIP FUND, MILLWRIGHTS LOCAL 720 PENSION FUND, MILLWRIGHTS LOCAL 720 APPRENTICESHIP FUND, I.B.P.A.T. LOCAL NO. 728 HEALTH & WELFARE FUND, I.B.P:.A.T. LOCAL NO. 728 APPRENTICESHIP TRAINING FUND, CONSTRUCTION & GENERAL LABORERS LOCAL 1177, MILLWRIGHTS & MACHINERY ERECTORS LOCAL UNION NO. 720 and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 406, there being no just cause for delay.

BATON ROUGE, LOUISIANA, this 27 day of March, 1989.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

DKT & ENTERED
DATE_____
NOTICE MAILED TO:

DATE 3-22-89 BY RG
ELLIS NS
URANN jg
HEALEY

APPENDIX D

Employee Retirement Income Security Act, 29 U.S.C. §1001 et seq.

§ 502(a), 29 U.S.C. § 1132(a):

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

. . .

§ 502(g) (2), 29 U.S.C. § 1132(g) (2):

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

§ 514(a), 29 U.S.C. § 1144(a):

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(b) of this title and not exempt under section 1003(a) of this title. This section shall take effect on January 1, 1975.

§ 514(c) and (d), 29 U.S.C. § 1144(c) and (d):

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

§ 515, 29 U.S.C. § 1145:

§ 1145. Deliquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

APPENDIX E

Louisiana Private Works Act, La. R.S. 9:4801 et seq.

SUBPART A. LIABILITY OF OWNERS AND CONTRACTORS FOR THE IMPROVEMENT OF AN IMMOVABLE

§ 4801. Improvement of immovable by owner: privileges securing the improvement

The following persons have a privilege on an immovable to secure the following obligations of the owner arising out of a work on the immovable:

(1) Contractors, for the price of their work.

(2) Laborers or employees of the owner, for the price of work performed at the site of the immovable.

(3) Sellers, for the price of movables sold to the owner that become component parts of the immovable, or are consumed at the site of the immovable, or are consumed in machinery or equipment used at the site of the immovable.

(4) Lessors, for the rent of movables used at the site of the immovable and leased to the owner by written contract.

(5) Registered or certified surveyors or engineers, or licensed architects employed by the owner, for the price of profeessional services rendered in connection with a work that is undertaken by the owner.

§ 4802. Improvement of immovable by contractor; claims against the owner and contractor; privileges securing the improvement

A. The following persons have a claim against the owner and a claim against the contractor to secure payment of the following obligations arising out of the performance of work under the contract:

(1) Subcontractors, for the price of their work.

(2) Laborers or employees of the contractor or a subcontractor, for the price of work performed at the site of the immovable.

(3) Sellers, for the price of movables sold to the contractor, or a subcontractor that become component part of the immovable, or are consumed at the site of the immovable, or are consumed in machinery or equipment used at the site of the immovable.

(4) Lessors, for the rent of movables used at the site of the immovable and leased to the contractor or a subcontractor by written contract.

B. The claims against the owner shall be secured by a privilege on the immovable on which the work is performed.

C. The owner is relieved of the claims against him and the privileges securing them when the claims arise from the performance of a contract by a general contractor for whom a bond is given and maintained as required by R.S. 9:4812 and when notice of the contract with the bond attached is properly and timely filed as required by R.S. 9:4811.

D. Claims against the owner and the contractor granted by this Part are in addition to other contractual or legal rights the claimants may have for the payment of amounts owed them.

E. A claimant may assert this claim against either the contractor, his surety, or the owner without the joinder of the others. The claim shall not be subject to a plea of discussion or division.

F. A contractor shall indemnify the owner for claims against the owner arising from the work to be performed under the contract. A subcontractor shall indemnify the owner, the contractor, and any subcontractor from or through whom his rights are derived, for amounts paid by them for claims under this part arising from work performed by the subcontractor.

G. To be entitled to assert the claim given by R.S. 9:4802(A)(4) the lessor of the movables shall deliver a copy of the lease to the owner and to the contractor not more than ten days after the movables are first placed at the site of the immovable for use in a work.

§ 4803. Amounts secured by claims and privileges

A. The privileges granted by R.S. 9:4801 and the claims granted by R.S. 9:4802 secure payment of:

(1) The principal amounts of the obligations described in R.S. 9:4801 and R.S. 9:4802(A), interest due thereon, and fees paid for filing the statement required by R.S. 9:4822.

* * *

(3) Amounts owed under collective bargaining agreement with respect to a laborer's or employee's wages or other compensation for which a claim or privilege is granted and which are payable to other persons for vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, and other fringe benefits considered as wages by the secretary of labor of the United States in determining prevailing wage rates, unless the immovable upon which the work is performed is designed or intended to be occupied primarily as a residence by four families or less. Trustees, trust funds, or other persons to whom the employer is to make such payments may assert and enforce claims for the amounts in the same manner and subject to the same procedures provided for other amounts due laborers or employees granted a claim or privilege under this Part.

* * *

NO. 89-1710

In the Supreme Court of the United States

OCTOBER TERM, 1990

IRON WORKERS MID-SOUTH PENSION FUND, LOUISIANA LABORERS HEALTH & WELFARE FUND AND LABORERS NATIONAL PENSION FUND
Petitioners,

v.

BORDEN CHEMICAL, A DIVISION OF BORDEN, INC.,
Respondent.

Sub nom: Iron Workers Mid-South Pension Fund, et al v. Terotechnology Corporation, et al

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit's decision that the Louisiana Private Works Act lien procedures are preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq. presents the following questions:

(1) Whether ERISA preempts La. R.S. 9:4803(A) insofar as it makes express reference to ERISA employee benefit plans and provides an independant cause of action to said plans and their trustees against property owners, who are not obligated to make contributions under ERISA, to recover delinquent contributions owed by signatory contractors.

(2) Whether the Fifth Circuit's decision conflicts with this Court's decision in *Mackey v. Lanier*, 486 U.S. 825, 108 S.Ct. 2182 (1988).

(3) Whether the Fifth Circuit has correctly applied ERISA preemption standards previously set forth by this Court.

PARTY LIST AND CORPORATE PARENTS

The names of all parties in the proceeding below appear in the caption of this case, fulfilling United States Supreme Court Rule 14(b).

Iron Workers Mid-South Pension Fund, Plaintiff-Appellant

Louisiana Laborers Health & Welfare Fund, Plaintiff-Appellant

Laborers National Pension Fund, Plaintiff-Appellant

Iron Workers Welfare Fund, Plaintiff

Iron Workers Local 623 Educational & Training Program Trust Fund, Plaintiff

Louisiana Laborers Local 1177 Apprenticeship Fund, Plaintiff

Construction & General Laborers Local 1177, Plaintiff

Millwrights Local 720 Pension Fund, Plaintiff

Millwrights Local 720 Apprenticeship Fund, Plaintiff

Millwrights & Machine Erectors Local Union 720, Plaintiff

IUOE Local 406, Plaintiff

I.B.P.A.T. Local Union No. 728 Health & Welfare Fund, Plaintiff

I.B.P.A.T. Local Union No 728 Apprenticeship Training Fund, Plaintiff

Terotechnology Corporation, Defendant

Borden Chemical, a Division of Borden, Inc.,
Defendant-Appellee

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Counsel for Defendant-Appellee

Thomas R. Peak
Counsel for Defendant-Appellee

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Taylor, Porter, Brooks & Phillips, Counsel for Defendant-Appellee

Marie Healey, Counsel for Plaintiffs-Appellants and Plaintiffs

Gardner, Robein & Urann (formerly Gardner, Robein & Healey) (Former law firm of counsel for Plaintiff-Appellant)

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No. 90-1710

In the Supreme Court
of the United States

IRON WORKERS MID-SOUTH PENSION FUND, LOUISIANA LABORERS HEALTH & WELFARE FUND AND LABORERS NATIONAL PENSION FUND
Petitioners,

v.

BORDEN CHEMICAL, A DIVISION OF BORDEN, INC.,
Respondent.

Sub nom: Iron Workers Mid-South Pension Fund, et al v. Terotechnology Corporation, et al

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Fifth Circuit Court of Appeals affirming the district court decision preempting the Louisiana Private Works Act under ERISA is reported at 891 F.2d 548 (5th Cir. 1990), and appears as Appendix B to the Petition for Writ of Certiorari. The district court's opinion is reported at 700 F.Supp 310 (M.D. La. 1988), and appears as Appendix C to the said Petition.

JURISDICTION

The Court of Appeals entered its judgment in this case on January 5, 1990. The Court of Appeals denied a timely petition for rehearing with suggestion for rehearing en banc on February 7, 1990. (Appendix A to the Petition for Writ of Certiorari)

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 514(a) of ERISA, 29 U.S.C. §1144(a) (1982), provides in pertinent part:

> The provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

The Louisiana Private Works Act, in La. R.S. 9:4803 (A), provides in pertinent part that its statutory privileges and claims secure payment of:

> Amounts owed under collective bargaining agreements with respect to a laborer's or employee's wages or other compensation for which a claim or privilege is granted and which are payable to other persons for vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, and other fringe benefits considered as wages by the Secretary of Labor of the United States in determining prevailing wage rates, unless the immovable upon which the work is performed is designed or intended to be occupied primarily as a residence by four families or less. Trustees, trust funds or other persons to whom the employer is to make such payments may assert and enforce claims for the amounts in the same manner and subject to the same procedures pro-

vided for other amounts due laborers and employees granted a claim or privilege under this part.

SUMMARY OF ARGUMENT

Respondent, Borden Chemical, a Division of Borden, Inc. (hereinafter "Borden"), respectfully suggests to this Honorable Court that the petition for writ of certiorari should be denied. The Fifth Circuit's decision is correct. La. R.S. 9:4803(A) provides an independent cause of action to ERISA employee benefit plans and their Trustees for the collection of delinquent contributions owed by a contractor. This state statute, which makes express reference to ERISA employee benefit plans and provides a remedy to employee benefit plans which is not provided under ERISA, clearly "relates to" employee benefit plans. Accordingly, under this Court's precedent and as the Fifth Circuit held, La. R.S. 9:4803(A) is preempted by ERISA. No writ of certiorari should issue in this matter.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY APPLICABLE DECISION OF THIS COURT

Petitioners have suggested that the Fifth Circuit's decision in this matter conflicts with *Mackey v. Lanier,* 486 U.S. 825, 108 S. Ct. 2181, 100 L.ED. 2d 836 (1987). Petitioners' position is patently erroneous. In *Mackey* this Court reaffirmed its prior holdings in *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S. CT. 2890, 77 L.Ed. 2d 490 (1983), *Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41, 107 S. Ct. 1549, 95 L.Ed. 2d 39 (1987) and *Metropolitan Life Insurance Company v. Massachusetts,* 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed 2d 728 (1985) that state laws (such as La. R.S. 9:4803(A)) which are specifically designed to

affect employee benefit plans are preempted under §514(a), 29 U.S.C. §1144(a). In *Mackey*, this Court held that one of the two Georgia statutes under scrutiny, the one which made express reference to ERISA employee benefit plans, was preempted. As this Court held, *Mackey*, "[t]he state statute's express reference to ERISA plans suffices to bring it within the federal law's preemptive reach."

The Georgia statute which was held not to be preempted in *Mackey* is clearly distinguishable from La. R.S. 9:4803(A) on two grounds: first, that it made no reference to ERISA employee benefit plans; and, second, that it did not, as La. R.S. 9:4803(A) does, provide an independent cause of action to ERISA plans, trustees, beneficiaries or participants for the collection of unpaid contributions, but merely provided a means to enforce a judgment obtained *against ERISA plans* under Section 502, 29 U.S.C. § 1132, or state law. La. R.S. 9:4803(A) is more properly analogous to the Georgia statute held by this Court in *Mackey* to be preempted by Section 514(a) of ERISA.

Petitioners contend that they are permitted, under *Mackey*, to use state law procedures to garnish funds owed to Terotechnology Corporation by Borden in execution of the judgment rendered against Terotechnology for delinquent contributions. Respondent does not dispute this contention. However, petitioners do not stop there. Instead, petitioners argue that because of this, there is no reason that they shouldn't be able to collect funds directly out of Borden's pocket (not funds owed to Terotechnology by Borden) under La. R.S. 9:4803(A). Despite petitioners' argument to the contrary, this is a case of apples and oranges, just as was the case of the two Georgia statutes under scrutiny in *Mackey*.

Petitioners cite the cases of *Plumbers Local 458 Holiday Vacation Fund v. Appleton Paper, Inc.*, 10 EBC 1806 (Wis. Cir. Ct. 1988), affirmed 11 EBC 1257 (Wis. Ct. App. 1989) and *Carpenters Health & Welfare Trust Fund v. Parnas Corp.*, 176 Cal. App. 3d 1196, 222 Cal. Rpt. 668, 7 EBC 1031 (1986) as cases (which petitioners contend) correctly applied the *Mackey* decision to factual circumstances involving state construction lien statutes. In *Appleton*, petitioners have noted the Court's holding that the Wisconsin lien law is a "general statute *without any specific reference to ERISA obligations* . . . " (Petition for Writ of Certiorari, page 11) (Emphasis supplied.) This admission by petitioners effectively distinguishes *Appleton* and the statutes at issue therein from La. R.S. 9:4803(A). In describing the statutes, the Wisconsin Court stated:

> The statutes contain no reference to employee welfare plans or funds, but instead are laws with general application.

The Wisconsin Court went on to distinguish the statutes at issue and its holding from that of the California Court of Appeal in *Carpenters Southern California Administrative Corporation v. El Capitan Development Co.*, 197 Cal. App. 3d 790, 243 Cal. Rpt. 132 (Cal. 1988), in which the Court held California's mechanic's lien law was preempted by ERISA, as follows:

> In contrast (to the California statute), a perusal of Wisconsin statutes 779.03, 779.035 and 779.036 shows no reference to employee benefit plans whatsoever. These statutes are designed to provide a lien on funds due a general contractor or subcontractor to persons who provide labor or materials in improvement work and are not paid. The only reason an employee benefit plan is

> involved with this statute at all is the fact that the employees' lien was assigned to an employee benefit plan and these plans then step into the shoes of the employees to attempt to enforce the employees' lien. Nothing could relate in a more tenuous, remote or peripheral manner to an employee benefit plan.
>
> In addition, the Wisconsin law does not create rights in real estate like the California law but attaches to funds due a prime contractor or subcontractor. It is remedial and gives the Funds a secondary course of action to recover the payments Augie's was obligated to provide.

For these reasons, *Appleton,* a Wisconsin state court decision, is distinguishable and inapplicable. The Wisconsin lien statute did no more than allow (like the general garnishment statute in *Mackey)* the attachment of funds *owed to the signatory contractor which was obligated to make contributions to an ERISA plan.* It did not, as does La. R.S. 9:4803(A), create or provide a cause of action to an ERISA plan to recover delinquent contributions directly from a nonsignatory property owner. In *Parnas*, a decision which predates both *Pilot Life* and *Mackey*, the California Court applied an inappropriate test in order to reach the conclusion that the lien statute at issue was not preempted. This holding is placed into question, if not overruled, by *El Capitan,* a subsequent California appellate decision, and cannot stand under *Mackey* and this Court's holding that state statutes which "relate to " employee benefit plans are preempted by ERISA.

The Fifth Circuit's decision herein, which held La. R.S. 9:4803(A) to be preempted as a state statute making express reference and providing an independent cause of action to ERISA employee benefit plans and Trustees of

said plans, is correct and does not conflict with this Court's decision in *Mackey, supra*, or any other applicable decision of this Court.

II. THE FIFTH CIRCUIT'S DECISION IS IN ACCORD WITH THE DECISIONS OF THIS COURT AND RESULTED FROM THE APPLICATION OF THE CORRECT STANDARD FOR ERISA PREEMPTION

Petitioners contend that the Fifth Circuit's decision illustrates conflicts and confusion among the Circuit Courts as to the standard for ERISA preemption in general. Several of the cases which are cited by petitioners and which applied the two-prong test derived from this Court's decision in *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed. 2d. 402 (1981) predate this Court's later decisions in *Mackey* and *Pilot Life*. If there is confusion or conflict among the circuits as to the applicable standard to be utilized in determinations of whether ERISA preempts state statutes, respondent questions whether this case would be the proper vehicle for its resolution. The Fifth Circuit in its decision has applied the proper "relates to" standard enunciated and applied by this Court in *Mackey, Shaw, Pilot Life, Metropolitan Life Ins. Co. v. Massachusetts* and *Massachussetts v. Morash*, 490 U.S. ____ 109 S.Ct. ____ 104 L.Ed. 2d 98 (1989). La. R.S. 9:4803(A) makes express reference to ERISA employee benefit plans and provides a cause-of-action against non-signatory property owners for the collection of unpaid contributions in circumvention of remedies provided under ERISA. It therefore clearly relates to employee benefit plans and is preempted pursuant to § 514(a) of ERISA.

Petitioners argue that the risk of loss as a result of the insolvency of a signatory contractor should fall upon the property owner, who should make up the delinquent contributions, rather than upon the laborer. This is not where Congress in enacting ERISA chose to place the responsibility for contributions to employee benefit plans.

Petitioners incorrectly, and without one scintilla of evidence in the record, allege that Borden could have protected itself from the consequences of La. R.S. 9:4803(A) by bonding this job but failed to do so. This was not possible, in law or fact, in that the work being performed by Terotechnology was not construction work, but was instead ongoing maintenance work of indefinite duration at the facility.

Petitioners do not come before this Court with "clean hands." As a result of petitioner's inadvertence, neglect or acquiescence, Terotechnology, the party obligated to make the contributions to the ERISA plans, was allowed to fall six months behind without Borden's knowledge. What petitioners really want in this case and future cases is an "out." If La. R.S. 9:4803(A) is held to not be preempted by Section 514(a) this action against a property owner would effectively encourage such "neglect" on the part of the plans and their administrators by giving them an additional source (not obligated or responsible for the contributions under ERISA) from which to recoup the shortage which they allowed to occur. Borden has already paid Terotechnology. Petitioners seek to have Borden pay twice as a consequence of what was, at a minimum, petitioners' own lack of diligence. The Fifth Circuit's decision that ERISA preempts La. R.S. 9:4803(A) places responsibility for unpaid contributions where Congress and ERISA's statutory language intended and provided.

CONCLUSION

The Fifth Circuit's decision that La. R.S. 9:4803(A) is preempted by ERISA §514(a) is correct and was reached by its application of the proper standard which has been repeatedly utilized by this Court in determining whether a state statute is preempted by ERISA. For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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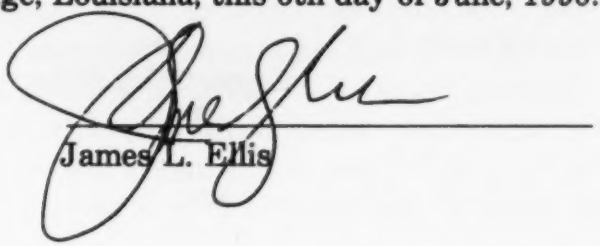
CERTIFICATE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has this day been mailed postage prepaid, to Ms. Marie Healey, Attorney at Law, 336 Lafayette Street, Suite 200, New Orleans, Louisiana, 70130.

Baton Rouge, Louisiana, this 6th day of June, 1990.



James L. Ellis

(3)

NO. 89-1710

In the Supreme Court of the United States

OCTOBER TERM, 1989

IRON WORKERS MID-SOUTH PENSION FUND, LOUISIANA LABORERS HEALTH & WELFARE FUND AND LABORERS NATIONAL PENSION FUND,

Petitioners,

vs.

BORDEN CHEMICAL, A DIVISION OF BORDEN, INC.,

Respondent.

Sub-nom: Iron Workers Mid-South Pension Fund, et al v. Terotechnology Corporation, et al

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. *The Fifth Circuit Court's decision is contrary to the Court's decision in Mackey v. Lanier.*

Respondent first argues that the Court's decision in *Mackey v. Lanier,* 486 U.S. 825, 108 S.Ct. 2182 (1987), is entirely consistent with the decision below of the Court of Appeals for the Fifth Circuit. Respondent reasons that the Georgia statute saved from preemption in *Mackey* is distinguishable from La.R.S. 9:4803(A). Petitioners urgently disagree.

The Georgia statute at issue in *Mackey* was a traditional state garnishment mechanism of general application similar, but not identical, to the garnishment statutes of any other state. What set it apart, however, was an express exception for ERISA plans, Georgia Code Ann. §18-4-22.1 (1982), providing, in pertinent part:

> Funds or benefits of a pension, retirement or employee benefit plan or program *subject to the provisions of the federal Employee Retirement Income Security Act of 1974, as amended,* shall not be subject to the process of garnishment . . . . [Emphasis added.]

Mackey, supra, 108 S.Ct. at 2184, n.2. The Court correctly found this exception—despite its possible intent to help effectuate ERISA's underlying purposes—to be preempted:

> [W]e hold that Georgia Code Ann. §18-4-22.1, *which singles out ERISA employee benefit plans for different treatment* under state garnishment procedures, is pre-empted under §514(a). The statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach. [Emphasis added.]
>
> * * * * *
>
> This "different treatment" is illustrated, not only by the express reference to ERISA plans in the language of §18-4-22.1, but also in the disparate treatment accorded to non-ERISA benefit plans

> under Georgia law. Under the State's garnishment statutes, non-ERISA pension and retirement plans are exempted from garnishment, but no exemption is provided for non-ERISA employee welfare benefit plans. Compare Ga.Code Ann. § 18-4-22 (Supp.1987) with Ga.Code Ann. § 18.4.22.1 (1982) *Consequently, ERISA welfare benefit plans are protected from garnishment under Georgia law,* but *non-ERISA* plans are not so protected. [Emphasis added.]

Mackey, 108 S.Ct. at 2185.

However, no such conclusion may be reached by reference to the Louisiana Private Works Act. First, contrary to Respondent's claim, La.R.S. 9:4803(A) makes no express reference to "ERISA plans, as did Georgia Code Ann. § 18-4-22.1; rather, it refers to "*Trustees, trust funds, or other persons* to whom the employer is to make such payments, (emphasis added)" *under a collective bargaining agreement,* for

> vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, and other fringe benefits considered as wages by the Secretary of Labor of the United States in determining prevailing wage rates, ...

La. R.S. 9:4803(A). Thus, some ERISA plans are included in the §4803(A) definition of "trust funds", while others are not.[1] Conversely, some non-ERISA plans are also included, while others are not.[2] Additionally, §4803(A) gives stand-

---

1. For example, jointly administered plans such as Petitioners, which are established on the basis of and administered under §302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §186(c)(5), are also administered under ERISA. §2(1)(B) of ERISA, 29 U.S.C. §1001(1)(B). However, a plan which is not collectively-bargained and whose contribution obligation is not defined by a labor agreement is not included in the "trust fund" definition even though administered under ERISA.

2. A collectively-bargained *disability* benefits plan, e.g., may

ing to "other persons" than "trustees" and "trust funds", providing only that the contract defines that "other person" as the recipient of the benefit in question. Thus, unlike the Georgia statute in *Mackey*, §4803(A) contains no express reference to ERISA plans.

Moreover, while Petitioners agree that Georgia Code Ann. §18-4-22.1 sought to exempt ERISA plans from state garnishment process, no similar exemption is found in the Louisiana statute at issue, for La.R.S. 9:4803(A) does not treat ERISA plans differently nor accord them any more favorable treatment under the law than non-ERISA plans or "other persons" having rights under the agreement. The different treatment, rather, is based on whether or not the trust in question is collectively-bargained. And since *all* collectively bargained plans are by very definition both established and administered under §302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §186(c)(5),[3] as well as under ERISA,[4] the disparate focus of §4803(A) is rather upon whether or not the plan in question is administered under §302(c)(5) of the Labor Management Relations Act. Thus, §9:4803(A) treats all plans and all persons whose standing springs from a collective bargaining agreement, whether ERISA regulated or not, in exactly the same manner. Therefore, the two statutes are by no means

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Footnote 2 continued.
nevertheless not be regulated by ERISA because exempted from ERISA coverage, §4(b)(3), 29 U.S.C. §1003(b)(3); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 106-7, 103 S.Ct. 2890, 2905 (1983); while a legal services fund tax qualified under §501(c)(5) of the Internal Revenue Code, 26 U.S.C. §501(c)(5) and sponsored only by a Union, *would* be governed by §2(1), ERISA, 29 U.S.C. §1001(1). The first would be excluded from the §4803(A) "trust fund" class, while the second would be included.

3. §302(c)(5) of the Labor Management Relations Act provides, in pertinent part, that collectively bargained payments by employers must be made to a separate trust fund established to provide benefits, which trust must be jointly administered by labor and management.

4. The ERISA definition of "employee benefit welfare plan", includes at §3(1)(B) any plan providing "any benefit described in 186(c) of this title . . . ."

analogous, as Respondent argues.

Petitioners also take issue with Respondent's further argument, that §9:4803,unlike Georgia's general garnishment law, provides an independent cause of action "for the collection of unpaid contributions." This argument was endorsed by the Fifth Circuit Court, which noted that:

> Louisiana's Private Works Act cannot be brought under the authority of *Mackey*, because without it Borden, who is not an employer, would not be liable to the Funds. The Private Works Act creates a substantive right against the property owner that is not created by ERISA, and goes beyond merely a means of enforcing a judgment.

Iron Workers Mid-South Pension Fund, et als v. Terotechnology, et als., 891 F.2d 548, 556 (5th Cir. 1990).

Petitioners point out to the Court that the substantive obligation created by the Louisiana Private Works Act, whereby the owner of a project is rendered liable as a guarantor of a contractor performing work at a jobsite, by no means intrudes upon ERISA; neither an owner nor a contractor are, without more, ERISA parties, ERISA does not regulate this relationship, and no "plan" is involved. Moreover, the substantive right created by the Louisiana law enabling the contractor's employee to enforce his rights to wages, including fringe benefits, against the owner as his employer's guarantor, does not intrude upon ERISA either; again, ERISA does not regulate this relationship or this cause of action, and no plan is involved. Were these the only provisions of the Louisiana Private Works Act at issue, then, their preemption under ERISA would be entirely improper.

Rather, it is the fact that the state statute validates the standing of others, including ERISA plans, to pursue the employee's rights against the owner, that leads §4803(A) into the preemption quagmire. But it is *not* §4803(A), or any other provision in the Private Works Act,

that creates this cause of action in favor of an employee benefit plan—it is *the collective bargaining agreement itself* that creates the cause of action in the plan, by requiring that contributions to be paid by the employer for work performed by its covered employees be paid not to the employee but directly to a third party beneficiary employee benefit plan. In effect, the labor agreement thus *diverts* the cause of action from the employee to the plan. And this contractual action of the Plan would exist whether or not it were recognized by the Private Works Act.

In short, while a lien enforcement action by an employee against the owner of a project is indeed a substantive right that would not exist absent the Louisiana law, the Fund's right to step in the employee's shoes and to pursue that action on the Fund's behalf is not. It arises from the collective bargaining agreement, not from the state law. Viewed in this light, the lien action so pursued against the owner is no longer a debt for contributions owed by the employer, as it would be against the contractor, but is rather an action for damages owed under a statutory guarantee, the dimensions of which are measured by the employer's contractual contribution rate. Like the *Mackey* general garnishment statute, the Louisiana Private Works Act "creates no substantive causes of action, nor new bases for relief, or any new grounds for recovery; [it] does not create the rule of decision in any case affecting liability." *Id.*, 108 S.Ct. at 2188, n.10.

Thus, the Funds' lien enforcement action against Borden under the Louisiana Private Works Act is nothing more than a run-of-the-mill contract suit against an employer's guarantor. It is no different than a state action by the Fund to collect from a private contractual surety a rental debt owed by a minor whose parents have guaranteed the rent on rental property owned by the Fund. In the first case, the damages are measured by the applicable collective bargaining agreement; in the second, they are measured by the lease. In neither case is preemption appropriate, for the obligations at stake and the par-

ties pursued are not of concern to ERISA or ERISA plans, and the state actions afforded to collect the debts in no manner either relate to ERISA plans or seek to regulate their terms.

Alternatively, even if ERISA preemption were mandated, a fund's action against a statutory surety, like an action against any other party who by contract or otherwise agrees to guarantee or to pay the debt of a contributing employer, may properly be regarded as an action under §502(a)(3)(ii) to enforce the terms of the plan rather than a §515 action to collect delinquent contributions, if like the Plans of Petitioners, the collective bargaining agreement defines the contribution rate incorporated into the Plan. Such an action against a surety is appropriately incorporated into ERISA as part of its federal common law.[5]

Accordingly, Petitioners suggest that review of the decision below is entirely appropriate, as contrary to this Court's opinion in *Mackey v. Lanier, supra.*

II. *Recently reported state court decisions further evidence their confusion in addressing state lien rights and ERISA preemption.*

Petitioners direct the Court's attention to two newly issued opinions of direct interest to the matter at hand.

In yet another preemption claim based on California's lien provisions found at Civil Code Section 3111,[6] *Sheet Metal Workers Pension Plan of So. California,*

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5. *See* Petitioners' argument in this respect in their Original Brief, at pp. 19-20.

6. *See also, Carpenters Health & Welfare Trust Fund v. Parnas Corp.*, 176 Cal.App. 1196, 222 Cal.Rpt. 668, 7 EBC 1031 (1986) (employee benefit fund's actions to enforce state lien rights is not preempted by ERISA); *Carpenters Southern California Administrative Development Corp. v. El Capitan Development Co.*, 243 Cal.Rpt. 132 (Cal.Ct.App. 1988), *cert.granted*, 246 Cal.Rpt. 209, 753 P.2d 1 (Cal.1988) (similar action is preempted by ERISA).

Arizona and Nevada, et al v. Columbia Savings & Loan Association, et al, 12 EBC 1494 (Superior Court, Appellate Department, County of Los Angeles), the Court found the state statute not to be preempted by ERISA, rejecting respondents' arguments that the Court's decisions in *Pilot Life Ins. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549 (1987) and *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 107 S.Ct. 2211 (1987) should dictate preemption. The court held:

> We have reviewed [Pilot Life and Coyne], relied upon by respondents, but do not find them to be persuasive or controlling in the relatively simple posture of this case.

Sheet Metal Workers, supra, 12 EBC at 1495-6. The Court dismissed respondents' argument that when a pension plan is attempting to collect monies "due and payable" *Id.* at 1496, ERISA controls. When examined against the purposes of ERISA, the court held, such an argument proves to be "an expression of 'black literalism' rather than a careful analysis of the law. The court viewed the lien action, rather, as:

> . . .an ordinary debt owed under collective bargaining agreements sought to be collected pursuant to a local statute designed to provide a remedy when payment is not forthcoming.
>
> * * *
>
> In the case at bar, the controversy is completely external to the pension plan entities and to the plans themselves. The entities are merely trying to collect an allegedly honest obligation on behalf of the members of the plan, with contractual standing to be the collecting entities.

Id.

The court's clear focus in *Sheet Metal Workers, supra,* upon the extraneousness of a fund's action to collect a contractually owed debt to the purposes of ERISA and ERISA plans, echoes the equally clear pronouncements

issued by this Honorable Court in *Mackey v. Lanier,* 483 U.S. 1004, 108 S.Ct. 2182 (1988) wherein the Court recognized that ERISA plans may sue and be sued in multiple run of the mill claims for unpaid rent or failure to pay creditors.

In a second recent case, *Boise Cascade Corp. v. Peterson,* ____ F.Supp. ____, 12 EBC 1384 (1990), the United States District Court for the District of Minnesota considered an ERISA preemption claim in context of a state administrative law mandating a three-to-one ratio of journeymen to apprentices in the high pressure pipefitting industry. The plaintiffs, all construction industry employers, attempted to convince the court that the state law must fall due to its intrusion into the administration of the ERISA multiemployer apprenticeship training plan jointly sponsored by the plaintiffs. After careful consideration of the purpose of the ERISA preemption clause and the underlying regulatory concerns of ERISA, the court held:

> The 3-to-1 rule is not preempted because *it is a rule of general application concerning a subject traditionally reserved to the states which has no implications for ERISA's regulatory concerns and only an incidental effect on the administration of training programs.* It in no way threatens the administrative integrity of employee benefit plans. The rule does not in any way conflict with Congress' purpose in enacting ERISA 'to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports,' [Citations omitted.] The rule is an occupational training requirement enacted to protect public safety. Even with ERISA's broad preemption provision, we 'must presume that Congress did not intend to pre-empt areas of traditional state regulation". *Metro-*

politan Life Insurance Co. v. Massachusetts, 105 S.Ct. 2380, 2389 [6 EBC 1545] (1985). . . . .

Boise Cascade Corp. v. Peterson, supra, 12 EBC at 1390-91. This analysis applies equally well to Louisiana's Private Works Act, as Petitioners have already argued to this Court. *See,* Petitioners' Original Brief herein at pp.18-19.

The foregoing two cases illustrate further the mounting judicial confusion and bewilderment evident in regard to an ERISA Fund's rights to pursue non-ERISA actions against non-ERISA parties who, like Borden, have no standing to seek ERISA's protection and, in fact, seek to utilize it to escape from state-imposed obligations traditionally outside of federal concern—all at the expense of the very parties—the Plans' participants—that ERISA purports to protect.[7]

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully urge this Honorable Court to review the erroneous decision herein of the Fifth Circuit Court of Appeals, which conflicts directly with prior Court decisions. In the event such "black literalism" survives, it will inevitably affect the increasingly fragile financial viability of multiemployer and other jointly-administered plans, including Petitioners', while permitting ERISA and non-ERISA plans whose contribution base in not collectively bargained to continue utilizing the Private Works Act

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7. Petitioners suggest to the Court that were the Petitioners the hypothetical owners of Louisiana property upon which laborers perfected wage liens under the Private Works Act, the ERISA preemption clause would not operate to protect the Plans from subsequent state lien enforcement actions, despite their intrusion into the Funds' administration or funding, since under this Court's reasoning in *Mackey, supra,* an ERISA plan must be prepared to respond to such ordinary claims. Petitioners cannot conceive any basis for treating them differently merely because they themselves assume a plaintiff position.

as a protective device against employer defaults. It is inconceivable such different treatment is either condoned by ERISA or within the contemplation of its legislative drafters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Reply Brief in Support of Petition for Writ of Certiorari has been served upon the following by depositing copies of same in the U.S. Mail, first-class postage prepaid, this 19th day of June, 1990.

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